LIBRARY
SUPREME COURT, U. S.

FILED
MAY 28 1968
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1411

REBA LUNOW,
Petitioner,

VERSUS

FAIRCHANCE LUMBER COMPANY, a Corporation; ROCKWELL-STANDARD CORPORATION, a Corporation; UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation; ALLEN & HOSHALL, a Co-Partnership, Composed of Lorin B. Allen and Robert H. Hoshall,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GENE H. HEMRY
First National Building
Oklahoma City, Oklahoma 73102

CLAYTON B. PIERCE
First National Building
Oklahoma City, Oklahoma 73102

EDGAR R. FENTON
405 Investors Capital Building
Oklahoma City, Oklahoma 73102

Counsel for Respondents

May, 1968

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

SUBJECT INDEX

	PAGE
Oklahoma Statutes Involved	1
Statement of the Case	1
Argument and Authority	4
Circuit Court of Appeals Properly Affirmed Judgment of District Court on Non-Constitutional Grounds Presented by the Record	4
Conclusion	8

AUTHORITIES

CASES:

Alma Motor Co. v. Timken-Detroit Axle Company, 329 U.S. 129, 67 Sup.Ct. 231, 91 L.Ed. 128	5
Howard v. Verdigris Valley Electric Cooperative, Inc., 201 Okla. 504, 207 P.2d 784 (1949)	7
Jaffke, Robert W., Petitioner v. William C. Dunham, Trustee, 352 U.S. 280, 77 Sup.C.t 307, 1 L.Ed. 2d 314	4
J. E. Riley Inv. Co. v. Commissioner of Internal Revenue, 311 U.S. 55, 61 S.Ct. 95, 85 L.Ed. 36	4

STATUTES:

85 O.S. 1961, Secs. 1-176 (Oklahoma Workman's Compensation Act)	1
85 O.S. 1961, Sec. 12	6, 7

In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1411

REBA LUNOW,
Petitioner,

VERSUS

FAIRCHANCE LUMBER COMPANY, a Corporation; ROCKWELL-STANDARD CORPORATION, a Corporation; UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation; ALLEN & HOSHALL, a Co-Partnership, Composed of Lorin B. Allen and Robert H. Hoshall,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OKLAHOMA STATUTES INVOLVED

Title 85 O.S. 1961, Sections 1-176. (Oklahoma Workman's Compensation Act.)

STATEMENT OF THE CASE

Petitioner commenced an action in the United States District Court for the Western District of Oklahoma invoking the jurisdiction of the Court on the ground of diversity of citizenship between petitioner, a citizen of Oklahoma, and respondents, citizens of different states.

Respondents pleaded in defense that the employment in which the injury to petitioner's husband was sustained was construction work subject to the exclusive jurisdiction of the Oklahoma Workman's Compensation Act, which abrogated all rights of action for damages which might otherwise accrue to all persons, including petitioner herein, under specific terms of the Statute, and the further defense that by decisions of the Supreme Court of Oklahoma referred to in the opinions of the District Court and the Circuit Court of Appeals, that no right of action existed in a wife for loss of consortium due to injuries to her husband.

There was no dispute as to the nature of the employment and operation being carried on in which petitioner's husband was employed at the time of the accidental injury, or that he was receiving compensation under the schedules of the Oklahoma Workman's Compensation Act.

A stipulation of the parties of twenty pages, including exhibits determining all factual matters as to the operation being carried on by respondents and the nature of the employment, was filed and was the basis of the findings of the District Court and the Court of Appeals in the opinions. Such stipulation appears in the record in this Court (Tr. 2).

The District Court filed its memorandum opinion dismissing the action on the ground that no invidious discrimination existed between husband and wife by reason of the decisions of the Supreme Court of Oklahoma, denying a wife a right of action for loss of consortium caused by injuries to the husband (Appendix A 1 to Petition).

The District Court found it unnecessary to pass on the question of whether such a right of action was denied to

both husband and wife by reason of the exclusive provisions of the Oklahoma Workman's Compensation Law, applying to both husband and wife.

The Court of Appeals for the Tenth Circuit, affirming the judgment of the District Court in dismissing the action, held that it was unnecessary to pass on the constitutional question for the reason that all claims arising out of the accident were governed by the exclusive operation of the Oklahoma Workman's Compensation Act, which made the right to the benefits of the compensation exclusive of all other rights of all parties, including both spouses, and that it was the duty of the court to decide the case upon non-constitutional grounds, where such non-constitutional grounds existed as in the case at bar (Appendix B to Petition, page A 10, 389 F.2d 212).

Petitioner contends, however, that the Court of Appeals was without authority to affirm the judgment of the District Court or to pass upon any issues raised below and before the Court in the record on appeal, and to affirm the dismissal upon any ground other than that passed upon by the District Court.

ARGUMENT AND AUTHORITY

Circuit Court of Appeals Properly Affirmed Judgment of District Court on Non-Constitutional Grounds Presented by the Record

In *Robert W. Jaffke, Petitioner* v. *William C. Dunham, Trustee,* 352 U.S. 280, 77 Sup.Ct. 307, 1 L.Ed.2d 314, it was held:

> "A successful party in the District Court may sustain its judgment on any ground that finds support in the record. If the District Court was in error in striking an admissible affidavit, a cross-appeal was not a prerequisite for the Court of Appeals to rule on the admissibility of the affidavit, and finding it admissible, to find that it afforded evidence in support of the District Court judgment. U. S. v. American Railway Express Company, 265 U. S. 425, 435-436, 44 S.Ct. 560, 563-564, 68 L.Ed. 1087; Langness v. Green, 282 U. S. 581, 583, 539, 51 S.Ct., 243, 246, 75 L.Ed. 520. Since the Court of Appeals did not consider the admissibility and weight of the affidavit, we remand to the Court of Appeals for its consideration of those issues. The claim in this case is that relevant, admissible evidence established a constructive trust. Whether it did so or not is a question of Illinois Law. The Court of Appeals, in the view it took of the case before it, did not reach this local question. On remand, that question too must be considered by the Court of Appeals.
>
> "Where the decision below is correct, it must be affirmed by the Appellate Court, though the lower tribunal gives a wrong reason for its action." *J. E. Riley Inv. Co.* v. *Commissioner of Internal Revenue,* 311 U.S. 55, 61 S.Ct. 95, 85 L.Ed. 36.

In *Alma Motor Co.* v. *Timken-Detroit Axle Company*, 329 U.S. 129, 67 Sup.Ct. 231, 91 L.Ed. 128, this Court stated in its opinion:

> "This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. This is true even though the question is properly presented by the record. If two questions are raised, one of non-constitutional and the other of constitutional nature, and the decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided (Citing Authorities).
>
> "This same rule should guide the lower Courts as well as this one. We believe that the structure of the problems before the Circuit Court of Appeals required the application of the rule to this case."

The Circuit Court of Appeals stated in its opinion, in the case at bar (Appendix B, page A 10).

> "The trial court dismissed the action on the latter ground" (constitutional grounds) "and did not reach the former" (Exclusive Rights and Liabilities under Oklahoma Workmen's Compensation Act.)
>
> "We think the first defense is foremost and decisive, for if a statutory interpretation obviates the necessity for deciding a constitutional issue, we are bound to pursue that course. See Alma Motor Co. v. Timken Company, supra, 329 U.S. 129-136, and cases cited. And, if, as we think, the judgment of the Court can be sustained by statutory interpretation, it should be affirmed even though the trial judge chose the constitutional ground for his decision."

The statement of the case in the memorandum opinion of the District Court and opinion of the Court of Appeals,

relating to the work being performed by respondents, shows that all of the respondents were performing some service in the conduct of a business and employment subject to the Oklahoma Workman's Compensation Act.

The statute involved is Title 85 O.S. 1961, Sec. 12, which provides:

> "The liability prescribed by the last preceding section shall be exclusive and in place of all other liability of the employer and any of his employees, at common law or otherwise, for such injury, loss of services or death, to the employee, spouse, personal representative, parents, dependents, or any other person, except that if any employer has failed to secure the payment of compensation for his injured employees as provided in this act, then an injured employee or his legal representative if death results from the injury may maintain an action in the Courts for damages on account of such injury, * * *."

It is stated on page 21 of the petition:

> "The Oklahoma Workman's Compensation Act was passed at a time when an action for loss of consortium was not granted to a woman for negligent injuries by third persons to her spouse. The Oklahoma Workman's Compensation has abrogated certain rights of the employee. The Court of Appeals, Tenth Circuit, has decided that even if the petitioner has a right to an action for loss of consortium the Workman's Compensation Law of Oklahoma has abrogated this right. This we say is error."

As stated in the opinion of the Circuit Court of Appeals, it seems to be conceded that the Supreme Court of Oklahoma has held that a wife has no cause of action for

damages resulting from negligent injury of her husband by another. The decision of the Supreme Court of Oklahoma to this effect is *Howard* v. *Verdigris Valley Electric Co-operative, Inc.*, 201 Okla. 504, 207 P.2d 784 (1949).

At the time of this decision the statute, Title 85 O.S. Sec. 12 read:

> "Liability prescribed by the last preceding section shall be exclusive except that if an employer has failed to secure the payment of compensation for his injured employee as provided by this act, then an injured employee or his legal representative if death results from the injury may maintain an action in the Courts for damages on account of such injury. * * *."

House Bill No. 312, Session Laws of Oklahoma 1951 (carried forward as Sec. 12, Title 85 O.S. 1961), amended this section to insert after the words "shall be exclusive" and before the words "except that if an employer has failed to secure the payment of compensation" the words "and in place of all other liability of the employer and any of his employees, at common law or otherwise, for such injury, loss of services or death to the employee, spouse, personal representative, parents, dependents, or any other person," thus making clearer and more definite, the legislative intent to make the liability of the employer under the Oklahoma Workman's Compensation Act complete and exclusive, and as stated by the Court of Appeals "that the Workman's Compensation Law is exclusive of all common law liability to either husband or wife, hence there can be no unconstitutional discrimination between them."

CONCLUSION

It is respectfully submitted that for the reasons stated and on the authorities cited, the petition for a Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit should be denied.

GENE H. HEMRY
First National Building
Oklahoma City, Oklahoma 73102
Attorney for Respondent
Rockwell-Standard Corporation,
a corporation

of Counsel:
JEROME E. HEMRY
First National Building
Oklahoma City, Oklahoma 73102

CLAYTON B. PIERCE
First National Building
Oklahoma City, Oklahoma 73102
Attorney for Respondent
Allen and Hoshall

of Counsel:
LYNN J. BULLIS, JR.
First National Building
Oklahoma City, Oklahoma 73102

EDGAR R. FENTON
405 Investors Capital Building
Oklahoma City, Oklahoma 73102
Attorney for Respondent
Fairchance Lumber Company
and United States Fidelity and
Guaranty Company

of Counsel:
ELLIOTT C. FENTON
405 Investors Capital Building
Oklahoma City, Oklahoma 73102

May, 1968